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No. 87-

In the Supreme Court of the United States

October Term, 1987

HERBERT BLUMENTHAL,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the mandatory minimum sentencing required by 42 Pa. C.S. §9718 and imposed by the trial court is violative of Fourteenth Amendment due process considerations as a legislative incursion upon the judiciary's discretionary functions in sentencing?

2. Do Fourteenth Amendment due process guarantees permit a conviction based solely on uncorroborated and proven suspect testimony of the alleged victims as to their respective ages at the time of the offenses?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Herbert Blumenthal and the Commonwealth of Pennsylvania).

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

HERBERT BLUMENTHAL respectfully petitions this Court for a Writ of Certiorari to review the Judgment and memorandum of the Superior Court of Pennsylvania entered on December 17, 1986, as to which allowance of appeal to the Pennsylvania Supreme Court was denied on June 24, 1987, upholding his conviction and sentence in the Court of Common Pleas, Bucks County, Pennsylvania, for Involuntary Deviate Sexual Intercourse.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

The unpublished Order of the Pennsylvania Supreme Court, filed on June 24, 1987, is Appendix A. The Superior Court's Order of summary affirmance, filed on December 17, 1986, and Memorandum Opinion appear in the Appendix beginning on B-1. The Post-Trial Opinion of the Court of Common Pleas for Bucks County, Pennsylvania (January 7, 1987) is published at 48 Bucks Co. C.R. 203 (1986) and appears in the Appendix beginning on C-1.

JURISDICTION

The Order of the Pennsylvania Supreme Court denying allowance of appeal was filed June 24, 1987. This Petition is filed within sixty days thereof, pursuant to this Court's Rule 20.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(3) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> "No state shall . . . deprive any person of life, liberty or property without due process of law . . ."

42 Pa. Cons. State. §9718 provides:

> "A person convicted of the following offenses when the victim is under sixteen years of age shall be sentenced to a mandatory term of imprisonment as follows:
>
> 18 Pa. C.S. §3123 (relating to involuntary deviate sexual intercourse) — not less than five years."

Section 3123 of the Pa. Crimes Code provides:

> "A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person: (5) who is less than 16 years old."

Section 3102 of the Pa. Crimes Code provides:

> ". . . when criminality depends on the child's being below a critical age other than 14 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age."

STATEMENT OF THE CASE

A. Procedural

Petitioner, a 61-year-old resident of New Jersey, was arrested on February 6, 1985 and charged with various criminal offenses, including multiple counts of involuntary deviate sexual intercourse, 18 Pa. C.S. Section 3123(5), alleged to have occurred in Falls Township, Bucks County, Pennsylvania over an extended period of time.

The case was tried before the Honorable Isaac S. Garb, President Judge of the Court of Common Pleas of Bucks County, sitting without a jury, commencing on August 20, 1985 and concluding on August 23, 1985. At the conclusion of the trial, on August 23, 1985, Judge Garb rendered the following verdict on the informations involved herein:

> Information # 1276/85, delivery and possession of controlled substances — guilty on all four counts.
>
> Information # 1270/85, delivery and possession of controlled substances — guilty on all four counts.
>
> Information # 1272/85, delivery and possession of controlled substances and several counts of indecent assault — guilty of counts 1-12 inclusive, and not guilty of counts 21-30 inclusive.
>
> Information # 1274/85, involuntary deviate sexual intercourse with one William Acevedo — guilty as

to counts 1-5, and not guilty as to the balance of the counts.

Information # 1275/85, involuntary deviate sexual intercourse with one Felix LeBron — guilty of counts 1-3 inclusive.

Information # 1269/85, involuntary deviate sexual intercourse and indecent assault with one Jose Hernandez — guilty of counts 1-7 inclusive.

Information # 1277/85, involuntary deviate sexual intercourse and indecent assault with one Chino Efrain Nietros — guilty of counts 1, 2 and 3 involving involuntary deviate sexual intercourse and not guilty as to the remaining counts.

Post Trial Motions in Arrest of Judgment and/or for New Trial were timely filed raising the aforesaid issues, and were denied by Judge Garb on January 7, 1986. Thereafter on January 22, 1986, Judge Garb imposed upon Petitioner one prison sentence of not less than five nor more than ten years on Informations # 1269/85, 1274/85, 1275/85, 1276/85 and 1277/85. Additionally, Petitioner was placed on a concurrent two-year probation on Information # 1270/85 and 1272/85.

On January 31, 1986, Petitioner filed a Motion for Reconsideration of Sentence pursuant to Pennsylvania R.C.P. 1410, which was denied without hearing by Judge Garb on February 6, 1986. On February 19, 1986, Petitioner filed his Notice of Appeal to the Superior Court of Pennsylvania. Said Appeal was denied, and the Judgment of the lower court was affirmed by the Superior Court on December 17, 1986. The Pennsylvania Supreme Court refused allowance of Appeal on June 24, 1987.

B. Factual

On February 6, 1985, Petitioner was arrested and charged with various criminal offenses including multiple counts of involuntary deviate sexual intercourse. Specifically, the Commonwealth at trial produced evidence that Petitioner maintained an apartment in Falls Township, Pennsylvania, where he periodically engaged in consensual sexual acts with young men from Trenton, New Jersey, sometimes additionally giving them marijuana, money or other items of value. The fact of these events was essentially admitted by Petitioner at trial. What Petitioner did dispute was the ages of the young men with whom he had these sexual contacts *and* his reasonable belief as to same, per 18 Pa. C.S. §3102. In essence, it was Petitioner's contention that (1) the young men were at least 16 years of age at the time of these contacts (and therefore of an age where each could consent to the sexual acts, thus vitiating any criminality ascribed to such conduct) and that (2) in any case, Petitioner reasonably believed that each young man was at least 16 years of age.

On August 20, 1985 upon the commencement of the testimony of the first alleged "victim", William Acevedo, defense counsel (now the Honorable Ward F. Clark, Judge of the Court of Common Pleas of Bucks County) specifically objected to any testimony by that witness as to his own age or birth date, and the following exchange took place:

> BY MRS. MABON:
>
> Q. Mr. Acevedo, how old are you?
>
> MR. CLARK: I object, Your Honor. I would like to put on the record in light of the nature of this

charge being involuntary deviate sexual conduct, the two most material ingredients of the sexual act and the age, in light of the enactment of the mandatory statute effective 3-1-83, and making it a mandatory five-year sentence, I believe that it's incumbent upon the prosecution to present the best evidence concerning age.

There is only case (sic) in Pennsylvania on age, that's Commonwealth versus Joyce, 1934 case which preceded the things I've just talked about. The seriousness of the offense, the materiality of that factor and other serious consequences of the mandatory sentencing act, I am objecting to this witness stating his age for all those reasons and for the basic reason that it's hearsay. And there's not law in Pennsylvania, to my knowledge, since Joyce dated about 1934; and at that time the consequences in that case weren't anywhere near what they are in this case.

MRS. MABON: Your Honor, I was unable to find any case on point. It's my understanding it's long been well-settled as to matters of pedigree an individual is able to testify to marriage or birth. I was not able to find a case on all fours in Pennsylvania; however, we were able to find Jason versus the State of Texas 589 Southwest 447 which says prosecution for an aggravated rape the victim was able to testify that she was under the age of seventeen.

THE COURT: I will overrule the objection.
(Transcript of August 20, 1985, pages 67 and 68.)

Thereafter, over objection, the trial court allowed each "victim" to testify as to his age and/or birthdate at the time of the alleged offenses.

REASONS FOR ALLOWANCE OF THE WRIT

A. This Case Presents Federal Question Considerations Regarding Fourteenth Amendment Due Process Challenges to Pa.'s Mandatory Sentencing Scheme Under 42 Pa. C.S. §9718

As heretofore mentioned, Petitioner was sentenced by the Honorable Isaac S. Garb on January 22, 1986 to a term of not less than 5 nor more than 10 years in a State Correctional Facility, pursuant to 42 Pa. C.S. §9718. This statute mandates such a sentence where the "victims" involved are under 16 years of age; the sentencing judge has no discretion to impose a sentence of any lesser degree.

Traditionally, in keeping with the strictures imposed by the Fourteenth Amendment of the U.S. Constitution and its due process considerations, sentencing has been a judicial function meant to be applied on an individualized basis with a fair regard for the nature of the offense, the character of the Defendant, the possible harm visited upon the victims and related factors.

Factually, if not legally, these acts were performed by the Petitioner on a consensual basis with individuals who obviously knew what they were doing. Petitioner is now a 63-year-old man of good background, well educated, with no prior criminal record and a distinguished career in government service. These acts grew out of a sexual preference over which Petitioner had no control. Yet, legally and practically speaking, the mandatory 5-year sentence pre-

scribed by 42 Pa. C.S. §9718 submits Petitioner to essentially the same deprivation of liberty as it would one of a less meritorious character and background who committed a violent sexual assault upon unwilling victims. To say that the legislature has simply provided a "floor" for minimum sentencing misses the mark. Such "floors", in terms of common sentencing patterns, approach the "ceiling" and are ill-designed to address the considerations which sentencing judges are otherwise required by tradition, court rule and statute to weigh in order to be just to the victim, society and Petitioner. It is the judiciary's function to exercise its discretion in weighing all relevant or material factors brought to its attention at sentencing in order to impose that just sentence. The legislature cannot constitutionally usurp that power or so limit it as it has purported to do under statutes such as 42 Pa. C.S. §9718. Said statute should be declared unconstitutional and Petitioner's sentence thereunder vacated.

B. Petitioner's Conviction Is Violative of Fourteenth Amendment Due Process Consideration in That It Was Based Solely on Uncorroborated Hearsay Testimony. Moreover, State Courts of Last Resort Are in Conflict as to the Admissibility of Such Evidence

---

Petitioner was charged with and convicted of multiple counts of the crime of Involuntary Deviate Sexual Intercourse, which is defined in relevant part by 18 Pa. C.S. §3123(5) as follows: "A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person . . . (5) who is less than 16 years of age". Obviously, there are just two primary elements of this

crime, i.e. the act of deviate sexual intercourse *and* the fact that the other party or "victim" is less than 16 years old and therefore legislatively determined to be unable to validly consent to the sexual act engaged in. Petitioner concedes that acts falling within the definition of "deviate sexual intercourse" took place (in this case, acts of fellatio by Defendant upon the young men); the Commonwealth, however, in turn, concedes and the evidence established that, as a matter of fact if not law, the "victims" consented to, or voluntarily participated in, these sexual acts. Thus, the only thing that made these acts crimes was the alleged ages of those individuals participating in the acts with Petitioner. Proof of the "victims" ages at the time of the sexual acts became *the* essential element of the crime on which the prosecution had to bear its burden of proof beyond a reasonable doubt.

There can be no doubt and it needs no citation that a person's statement as to his own age is hearsay. Obviously, no one can possibly remember the date of his or her birth. Human beings are not sufficiently developed at time of birth to be intellectually aware and cognizant of what date it is. We rely upon others, such as parents, relatives, doctors and keepers of vital statistics records to inform us of the date of our birth at some subsequent time. The next question, however, is: given the fact that one's statement as to his own age is hearsay, is it nevertheless admissible hearsay?

State Courts of last resort are in conflict as to this issue. In 1934, the Pennsylvania Supreme Court in *Commonwealth ex rel. v. Joyce,* 316 Pa. 434, 175 A. 422 (1934) held that such hearsay was admissable and that a person is competent to testify as to his own age. *Joyce, supra,* even

goes so far as to hold that this is the case even where one of the person's parents is available as a witness and is not called and even though it is not shown that no certificate or record of his birth is obtainable. 316 Pa. at 438. Cited as a rationale is "the probability of truthfulness and correctness on this matter . . ." 316 Pa. at 437. But what if that "probability of truthfulness and correctness" is shaken?

Petitioner contends that there is no better example of the mischief in such an assumption and the grave error and injustice to which it can lead than the facts of this case. In particular, note the testimony of Jose Hernandez, one of the "victims" in this case. During direct examination by the Commonwealth, he was allowed to testify as to his birthdate, which he stated to be March 24, *1970* [Tr. 8/21/85, p. 102]. On the cross-examination, however, it was established that this same witness had given a previous sworn statement to prosecutors in Trenton, New Jersey, in which he had stated that he was born on March 24, *1969* [Tr. 8/21/85, pp. 115-123]. After having already exhibited both confusion and evasiveness on this crucial point, the following exchange took place on the Commonwealth's redirect examination:

> BY MRS. MABON:
>
> Q. Do you remember telling the police that your date of birth was 1969; not 1970?
>
> . . .
>
> Q. Do you remember ever saying that to the police?
>
> A. Yes.
>
> Q. Would tell the Court why you did that?

A. *Because I was thinking I was older.*

THE COURT: Because what?

THE WITNESS: Because I told—because I wanted to look older, that's why.

[Tr. 8/21/85, pp. 124-125]

Once the bald statement as to a purported birthdate is penetrated, one can see that not only is the information hearsay, but it is also subject to confusion and even motivations which strip away its "probability of truthfulness and correctness". Where the Court finds this to be the case, such testimony should be rejected or at best, given so little weight that it cannot, alone and uncorroborated, sustain a criminal conviction.

Recognizing the inherent difficulties in this context, the New Hampshire Supreme Court ruled that such testimony was excludable when based on less than trustworthy sources.

In *State v. Ebelt*, 121 N.H. 147, 427 A.2d 29 (1981) the Court found the prosecutrix's testimony as to her own age in a statutory rape case inadmissable, rendering the evidence insufficient to sustain the Defendant's conviction. After acknowledging the general rule of admissibility, the Court stated:

> . . . In this case, there is no sound basis for the prosecutrix's testimony. Under oath, she stated that the origin of her knowledge of her age was the birth certificate; before she saw that document she went by another name and celebrated a different birthday. In fact, there is evidence that she originally believed herself to be a year older than the age shown by the birth certificate. Because there is no corroboration of the prosecutrix's age, her testimony is inadmissable.

427 A.2d at 32. Thus there is a strong argument for outright exclusion of several of the "victims" testimony which indicated no particular factual basis of their statements as to their respective ages and some of which indicated confusion or evasiveness as to the matter.

The case against Petitioner herein becomes even more suspect and weak when one combines with the aforsaid testimony regarding "victims" birthdates the often vague testimony regarding dates or periods of time in which the sexual acts took place. Nevertheless, in the case at bar, based upon such weak, suspect evidence, Petitioner was convicted of multiple counts of a serious offense carrying a *mandatory minimum prison sentence of 5 years*. The Trial Court indicated that the aforesaid evidence was "corroborated" by its own observations of the "victims" in court and photographs taken of them at the time of the occurrences which were admitted into evidence. The defense professes less confidence than the Trial Court in one's ability to visually distinguish between a 16-year old and a 15-year old (or even a 14-year old) where 5 years of a man's personal freedom are at stake.

Given the severe penalties that the Courts have been compelled to impose in such cases as the one at bar, the Commonwealth should be compelled to offer the strongest, most trustworthy evidence available as to every element of the crime before a citizen of this Commonwealth can be made to surrender his person to the confines of a prison cell for a substantial portion of his life. In particular, in this case, the Commonwealth had the opportunity to, at the very least, bring in parents or older family members of the victims to prove birthdates. Detective Armitage testified that he visited and talked with the parents or families of the "victims" shortly before trial and

certainly the Commonwealth had the legal ability to obtain interstate rendition of such persons as witnesses if they would not appear voluntarily. Moreover, there was no showing that birth certificates or other records could not be obtained to verify the "victims" ages and birthdates. Instead, the weakest, least trustworthy evidence was offered and accepted.

Such a practice offends long-standing notions of due process afforded to all criminal defendants. Basic Fourteenth Amendment considerations, as well as the conflict between state courts on this issue, require that a conviction grounded on such evidence be overturned.

CONCLUSION

For each of the foregoing reasons, Petitioner, HERBERT BLUMENTHAL, prays that this Court grant his Petition for a Writ of Certiorari to review the judgment and memorandum opinion of the Superior Court of Pennsylvania.

Respectfully submitted:

PRATT, GATHRIGHT & BRETT, P.C.
S/RICHARD HALE PRATT
Attorneys for Petitioner

DATE: August 21, 1987

Appendix

"A"
APPENDIX

Supreme Court of Pennsylvania
Eastern District

MARLENE F. LACHMAN, ESQ. — 468 City Hall
Prothonotary — Philadelphia, Pa. 19107
PATRICK TASSOS — (215)496-4600
Deputy Prothonotary

June 30, 1987

Richard Hale Pratt, Esquire
68 E. Court Street
Doylestown, PA 18901

RE: Commonweath of Pennsylvania v. Herbert Blumenthal, Petitioner
NO. 54 E.D. ALLOCATUR DOCKET 1987

Dear Mr. Pratt:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"June 24, 1987.

Petition Denied.

Per Curiam."

Very truly yours,

s/PATRICK TASSOS
PATRICK TASSOS
Deputy Prothonotary

/mz
cc: Alan M. Rubenstein, Esquire

"B"

IN THE SUPERIOR COURT OF PENNSYLVANIA
NO. 496 PHILADELPHIA 1986

J. 57025/86
COMMONWEALTH OF PENNSYLVANIA
v.
HERBERT BLUMENTHAL,
APPELLANT

Appeal from the Judgment of Sentence entered on January 22, 1986 in the Court of Common Pleas, Bucks County, Criminal Division, at Nos. 1269-2179/85.

BEFORE: McEWEN, DEL SOLE AND TAMILIA, JJ.

PER CURIAM:

Judgment of sentence affirmed.

FILED DEC 17 1986

Appendix

IN THE SUPERIOR COURT OF PENNSYLVANIA
NO. 496 PHILADELPHIA 1986

COMMONWEALTH OF PENNSYLVANIA
v.
HERBERT BLUMENTHAL,
APPELLANT

Appeal from the Judgment of Sentence entered on January 22, 1986 in the Court of Common Pleas, Bucks County, Criminal Division, at Nos. 1269-2179/85.

BEFORE: McEWEN, DEL SOLE AND TAMILIA, JJ.

MEMORANDUM:

Appellant was arrested and charged with a variety of criminal offenses, including multiple counts of involuntary deviate sexual intercourse. Following a non-jury trial, Appellant was found guilty on 18 counts of involuntary deviate sexual intercourse, as well as other crimes, not the subject of this appeal. Appellant was subsequently sentenced on January 22, 1986 to 5-10 years imprisonment on the sex-related offenses. In addition, Appellant received a concurrent 2 years probation on the remaining convictions. This appeal follows.

Three issues are raised before this court. First, Appellant contends that the evidence was insufficient to support a conviction for involuntary deviate sexual intercourse. Second, Appellant urges that the verdict as to the involuntary deviate sexual intercourse charges was contrary to the weight of the evidence. Third, Appellant alleges that

the mandatory minimum sentence required by 42 Pa. C.S.A. §9718 is unconstitutional.

We shall address the first two issues simultaneously, while recognizing our appellate scope of review. In testing the sufficiency of the evidence, we must view the evidence in a light most favorable to the Commonwealth as the verdict winner, accepting as true all evidence and reasonable inferences upon which the fact-finder could have properly based its verdict. *Commonwealth v. Easley,* 341 Pa. Super. 381, 491 A.2d 868, 869 (1985). Likewise, a fact-finder's determination as to the credibility of a witness is not an appropriate subject of appellate review. *Commonwealth v. Trignani,* 334 Pa. Super. 526, 483 A.2d 862, 871 (1984). "[T]he trier of fact in passing upon the credibility of all witnesses and determining the weight afforded the evidence, is free to believe all, part or none of the evidence." *Commonwealth v. Shirey,* 343 Pa. Super. 189, 494 A.2d 420, 422 (1985). Such a determination will not be disturbed upon appellate review absent a showing of manifest error. *Commonwealth v. Daniels,* 281 Pa. Super. 334, 422 A.2d 196, 198 (1980).

Appellant initially challenges the sufficiency and weight of the evidence on the theory that the victims were permitted at trial to testify to their own ages. The ages of the victims were a material issue inasmuch as Appellant was convicted under 18 Pa. C.S.A. §3123(5) of the Crimes Code, which has as a primary element the fact that the victim was less than 16 years of age.

It is established in this Commonwealth that a person may testify as to his/her own age, even though such testimony is, strictly speaking, hearsay. This general rule is based on the reasoning that "the probability of truthfulness

and correctness on this matter is such that 'courts have commonly preferred to accept this practical certainty rather than to insist on academic nicety.' " *Commonwealth ex rel. v. Joyce*, 316 Pa. 434, 437, 175 A. 422 (1934), citing Wigmore, Evidence (2d ed.), §667. Our Supreme Court in *Joyce* held that such evidence is received despite the fact that a parent of the person whose age is in issue is available, but is not called as a witness. Likewise, a person may testify on this matter, even though a birth certificate or other written records are obtainable. *Commonwealth v. Joyce* at 316 Pa. Super. 438-39.

Appellant concedes that, as a practical matter, such testimony is admissible; however, it is argued that the "probability of truthfulness and correctness", on which the general rule rests, was shaken during the course of testimony of the victims at trial. Appellant cites in support of this theory the fact that one victim had given a previous sworn statement to the police that he was born in 1969; however, at trial he testified that he was born in 1970. When questioned by the trial court on this inconsistency, the victim related the following explanation:

> BY THE DISTRICT ATTORNEY:
>
> Q. Would you tell the Court why you did that?
>
> A. Because I was thinking I was older.
>
> THE COURT: Because what?
>
> A. Because I told—because I wanted to look older, that's why.

(N.T. 8/21/85, pp. 115-25). From this excerpt, Appellant concludes that the victim was "subject to confusion and motivations", affecting his competency as a witness. (Appellant's Brief, p. 11).

Appendix

We have carefully examined the testimony of this particular victim and disagree with Appellant's assertion that he was incompetent to testify on this matter. As pointed out in the Commonwealth's brief, the victim's boasting of his age when talking to the police may be viewed as being demonstrative of an "immaturity consistent with his enunciated age." (Appellee's Brief, p. 7). Insofar as there were two logical interpretations of this testimony, the trial judge, sitting as fact-finder, could have reasonably interpreted this testimony in the latter manner and found this victim competent to testify.

We end this discussion by noting that, other than advancing the argument cited above, Appellant has failed to substantiate the claim that the victims should not have been permitted to testify to their ages. Further, the record is void of any attempt by Appellant's counsel to rebut the victims' testimony by offering testimony or direct evidence that the victims were not their stated ages. We have read the testimony of all of the victims, and find no indications that they could not accurately recount their birth dates. Therefore, we hold that the victims' testimonies were properly admitted.

Appellant further challenges the sufficiency and weight of the evidence by alleging that the trial court erred by using photographs of the victims, taken at the time of the occurrences, to conclude that they had been less than sixteen years of age. "The defense professes less confidence than the trial court in one's ability to visually distinguish between a 16 year old and 15 year old (or even a 14 year old) where 5 years of a man's personal freedom are at stake." (Appellant's Brief, p. 13). However, we note from the Trial Court Opinion that these photos were but

one contributing factor in the court's conclusion that the victims were under 16 years of age when the offenses were committed. (Trial Court Opinion p. 4). Moreover, "[a] person's age need not be proved only by direct testimony, but may also be proved by circumstantial evidence." *Commonwealth v. Nelson,* 320 Pa. Super. 488, 467 A.2d 638, 640 (1983). For this reason, we find no error committed by the trial court in using these photos to arrive at its factual determination.

Appellant's third and final argument is that the mandatory sentence required by 42 Pa. C.S.A. §9718 is an unconstitutional infringement upon the trial court's discretion in sentencing. This issue has recently been decided by this Court in *Commonwealth v. Wildermuth* in which it was held that §9718 did not represent an impermissible interference by the legislature with the sentencing power of the trial courts. *Commonwealth v. Wildermuth,* Pa. Super. , 501 A.2d 258, 262 (1985). Accordingly, we will not expound upon the merits of Appellant's argument.

Judgment of sentence affirmed. Jurisdiction of this Court relinquished.

Appendix

IN THE SUPREME COURT OF PENNSYLVANIA

NO. ———

———

COMMONWEALTH OF PENNSYLVANIA

Respondent

v.

HERBERT BLUMENTHAL

Petitioner

———

PROOF OF SERVICE

RICHARD HALE PRATT, ESQUIRE, hereby certifies that a true and correct copy of the Petition of Herbert Blumenthal for Allowance of Appeal has been served by first class mail on January 16, 1987 as follows:

The Honorable Isaac S. Garb, Bucks County Court House, Doylestown, Penna. 18901.

Alan D. Rubenstein, District Attorney, Bucks County Court House, Doylestown, Pa. 18901.

S/RICHARD HALE PRATT, ESQUIRE
PRATT, GATHRIGHT & BRETT, PC
68 East Court Street
Doylestown, Pa. 18901
(215) 345-1600
Attorney for Petitioner

Appendix

"C"

OPINION OF THE COURT BELOW

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL DIVISION
No. 1269 through 1279/1985

COMMONWEALTH OF PENNSYLVANIA
vs.
HERBERT BLUMENTHAL

OPINION AND ORDER

Defendant was tried before the undersigned without a jury on a variety of criminal informations charging him with violations of the Controlled Substance, Drug, Device and Cosmetic Act, specifically possession and delivery of marijuana, involuntary deviate sexual intercourse, indecent assault, and prostitution. He was convicted of the drug charges, some of the involuntary deviate sexual intercourse charges, and found not guilty of the indecent assault and prostitution charges. The defendant has filed motions in arrest of judgment and for a new trial. Those motions are denied.

The evidence at trial revealed, without contradiction, that the defendant is a 61 year old man, usually a resident of New Jersey and employed there. For approximately 10 years, he maintained an apartment in Falls Township, Bucks County, Pennsylvania, where he periodically entertained young men from Trenton upon whom he performed sexual acts, and sometimes gave them marijuana, money and other things of value. The young men in question, and others, testified to these events, and they were corroborated by various evidence found as a result of a search of the

defendant's premises. The defendant, likewise, gave a statement in which he admitted the foregoing. The defendant, in his own testimony, admitted the foregoing. Therefore, the defendant conceded the drug charges, but contends that the conviction of involuntary deviate sexual intercourse cannot stand.

The criminal informations which charge the defendant with the crimes of involuntary deviate sexual intercourse are based upon Section 3123(5) of the Crimes Code, 18 Pa. C.S.A. 3123(5) which provides as follows: "A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person: . . . (5) who is less than 16 years of age." The Commonwealth concedes, and the evidence corroborates, that the acts of deviate sexual intercourse were entered into consensually by the victims. Defendant contends that the Commonwealth has failed to prove that the victims were less than 16 years of age, and that question constitutes the major issue before us.

At trial, over objection, we permitted each of the victims to testify as to his own age. In each case, of course, he testified that he was under 16 years of age when these events occurred with the defendant. Contending that the admission of this evidence was erroneous, the defendant has filed a motion in arrest of judgment. Simply stated, regardless of the propriety of the entry of this evidence, we cannot grant a motion in arrest of judgment on a diminished record. Therefore, in determining whether the evidence was sufficient to support the verdict, we must consider all of the evidence admitted at trial whether erroneously or not. See *Commonwealth v. Mozzoccoli,* 475 Pa. 408, 380 A.2d 786 (1977); *Commonwealth v. Baker,* 466 Pa. 479, 353 A.2d 454 (1976), and *Commonwealth v. Jack-*

son, 223 Pa. Super. 497, 302 A.2d 420 (1973). Clearly, the evidence establishes that the defendant committed acts of deviate sexual intercourse upon each of these victims at a time when these victims were less than 16 years of age. Therefore, the evidence is clearly sufficient to support the verdict, and the motions in arrest of judgment are denied.

The defendant contends, however, that the evidence of age was erroneously received, and, therefore, that he is entitled to a new trial. We are satisfied that that evidence was properly received. Simply stated, the law of Pennsylvania is and always has been that a person is competent to testify as to his own age in spite of the fact that, technically, it may be hearsay evidence. See *Commonwealth ex rel. Joyce,* 316 Pa. 434, 175 A. 422 (1934). See also *Gaughan v. Metropolitan Life Insurance Company,* 50 Lackawanna Jurist. 9 (1948) and *Monroe Loan Society of Pennsylvania v. O'Dell,* 57 D. & C. 343 (1946). In accord, *Jason v. State,* 589 S.W. 2d 447 (1979). Furthermore, evidence of age is admissible from sources other than those who directly observed the event of birth, *Commonwealth v. Robinson,* 497 Pa. 49, 438 A.2d 964 (1981), and may be proven by circumstantial evidence, *Commonwealth v. Nelson,* 320 Pa. Super. 488, 467 A.2d 638 (1983).[1] Such circumstantial evidence, may, of course, include the observation by the trier of fact of the subject whose age is to be established. *Commonwealth v. San Juan,* 129 Pa. Super. 179, 195 A. 433 (1937). In this case, there was testimony by each of the victims of his age which, as we have found, was admissible. Furthermore, we observed each of these victims as he tes-

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[1] The fact that age of the victim may have assumed added significance because of the mandatory sentencing act relative to this case, see 18 Pa. C.S.A. 9718, does not mandate a change in this sensible rule of evidence, absent a concommitant act of the Assembly.

tified, and in most cases, were shown photographs taken of each of these victims by the defendant at the time of these occurrences. From this evidence, we were able to establish, as the finder of fact, that these victims were, in fact, less than 16 years at the time the events occurred and that the Commonwealth had adequately proven that fact beyond a reasonable doubt.

Defendant contends that he successfully established an absolute defense to these charges based on Section 3102 of the Crimes Code, 18 Pa. C.S.A. 3102. Therein, in relevant part, it is stated as follows:

> When criminality depends on the child's being below a critical age other than 14 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.

In our finding, we specifically stated, because we had so found, that we disbelieved that the defendant reasonably believed these children to be above 15 years of age. That finding is adequately supported on this record. First of all, the record shows the actual age of these children. Secondly, we observed them at the time of trial, and also knew of their appearance at the time of the events by virtue of the photographs placed in evidence. Furthermore, there was evidence which we accepted as true that the defendant had told certain persons that he wished to have young boys over 13 years of age brought to his home. Furthermore, we found the defendant's testimony regarding his inquiries as to the age of these younsters totally incredible. To hear the defendant's testimony, one would think that he was interviewing for a job or auditioning for a part in a play. Considering the nature of the activities and the conduct of the

defendant with relation to these youngsters, we find that testimony totally incredible and rejected it.

Defendant contends that the court erred in the manner in which he was permitted to use prior recorded statements of several of the victims. Prior to trial, the Commonwealth had taken recorded statements, under oath, from several of the victims. These statements were turned over to the defendant. In the course of cross-examining these victims, several were asked whether they had given these statements. The victims either denied giving the statements or denied any recollection of such. In the defense case, the defendant offered several portions of these transcribed statements. Some were offered for the purpose of impeaching those witnesses based upon inconsistencies between their testimony at trial and the information included in the statements. Regardless of whether the witnesses acknowledge the statements, it was proper for the defendant to admit those statements, the authenticity of which was conceded by the Commonwealth, for the purpose of impeachment. See *Commonwealth v. Brown*, 302 Pa. Super. 389, 448 A.2d 1097 (1982). A witness may be impeached by introducing his prior inconsistent statement without first confronting the witness with that statement. *Commonwealth v. Manning*, 495 Pa. 652, 435 A.2d 1207 (1981). However, the defendant likewise attempted to offer portions of the statements not for impeachment purposes but rather to establish the substance of those statements. That offer was rejected, and we think appropriately so. *Commonwealth v. Adkins*, 468 Pa. 465, 364 A.2d 287 (1976); *Commonwealth v. Moore*, 462 Pa. 231, 340 A.2d 447 (1975); and *Commonwealth v. Tucker*, 452 Pa. 584, 397 A.2d 245 (1973). The defendant complains that he was somehow prejudiced by this ruling

because the witnesses failed to acknowledge these as their statements. However, he has suffered no harm. Although the witnesses failed to acknowledge these statements, the Commonwealth has conceded them, and the court accepted them as authentic statements given by the witnesses. Therefore, the defendant had the opportunity to use any portions he wished for impeachment purposes. He never had the right to use them to establish the substance of the statements given. If he wished to establish those matters as fact, he had the opportunity to examine the witnesses directly on those questions. If the witnesses gave the same answers as contained in the statements, then he would have had the benefit of those facts. If the witnesses gave different testimony, then he could have used the statements in the record for impeachment purposes.

Lastly, defendant contends that the mandatory sentencing act under which his convictions fall, is unconstitutional. 42 Pa. C.S.A. 9718 provides that there shall be a mandatory sentence of not less than five (5) years when a person is convicted of the crime of involuntary deviate sexual intercourse where the victim is under sixteen (16) years of age. At this stage of the proceeding, we believe that this contention is premature because sentence has not yet been imposed. In any event, we will note, perhaps gratuitously, that our appellate courts have consistently held the recently enacted mandatory sentencing laws constitutional. See *Commonwealth v. Waters,* 334 Pa. Super. 513, 483 A.2d 855 (1984), *Commonwealth v. Hernandez,* Pa. Super. , 488 A.2d 293 (1985) (driving while under the influence related vehicular homicide), *Commonwealth v. Cooke,* Pa. Super. , 492 A.2d 63 (1985), *Commonwealth v. Cannon,* Pa. , 493 A.2d 1356 (1985), *Commonwealth v. Wright,* Pa. , 494 A.2d

354 (1985), *Commonwealth v. Woods,* Pa. , 495 A.2d 539 (1985), *Commonwealth v. Molina,* Pa. Super. , 496 A.2d 1196 (1985), *Commonwealth v. Bannister,* Pa. Super. , 497 A.2d 1362 (1985), *Commonwealth v. Anderson,* Pa. Super. , 498 A.2d 887 (1985) (all relating to crimes of violence committed with firearms); *Commonwealth v. Allen,* Pa. , 494 A.2d 1067 (1985) (relating to repeat offenders); *Commonwealth v. Scott,* Pa. Super. , 497 A.2d 656 (1985) (mandatory life sentence for a repeat murder); *Commonwealth v. Hoover,* Pa. Super. , 494 A.2d 1131 (1985) (90 day mandatory sentence for driving while under suspension, DUI related); *Commonwealth v. Hernandez,* Pa. Super. , 488 A.2d 293 (1985), *Commonwealth v. Godsey,* Pa. Super. , 492 A.2d 44 (1985) (mandatory sentences for DUI).

Based upon the foregoing, we are satisfied that the defendant's motions must be denied, and the verdict must stand.

ORDER

AND NOW, to wit, this 7th day of January 1986, it is hereby ORDERED that defendant's post-trial motions are denied, dismissed and overruled. Defendant is directed to appear in Court Room No. 2, at 10:00 a.m. on the 22nd day of January, 1986, for the purpose of imposition of sentence.

BY THE COURT:

s/Isaac S. Garb, President Judge

Appendix

No. 87—
IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

HERBERT BLUMENTHAL,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PROOF OF SERVICE

RICHARD HALE PRATT, ESQUIRE, hereby certifies that a true and correct copy of the Petition for Writ of Certiorari to the Superior Court of Pennsylvania has been served by hand delivery on August 21, 1987 as follows:

Secretary to the Honorable Isaac S. Garb, Bucks County Court House, Doylestown, PA 18901.

Secretary to Alan D. Rubenstein, District Attorney, Bucks County Court House, Doylestown, PA 18901.

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